

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

RIALTO UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012050064

ORDER DENYING MOTION FOR  
STAY PUT

Rialto Unified School District (District) filed a due process hearing request on April 24, 2012. District sought an order that the individualized education program dated October 11, 2011 and the addendum dated March 29, 2012, offered Student a free appropriate public education (FAPE) in the least restrictive environment (LRE).

On August 31, 2012, Student filed a Motion for Stay Put. Student seeks an order that District provide 12 hours of behavioral support supervision per month through Behavioral Autism Therapies (BAT). District filed an opposition to Student's motion for stay put on September 10, 2012, and an additional declaration in support of the opposition on September 13, 2012. Student filed a reply to District's opposition on September 19, 2012. District filed an Addendum to Opposition on September 27, 2012.

APPLICABLE LAW

Under federal and state special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. 300.518 (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School District* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904.)

For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP which has been implemented prior to the dispute arising. (*Johnson v Special Education Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1180; *Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) In California, "special educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the [IEP]." (Cal. Code Regs., tit. 5, § 3042.)

Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S ex rel. G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1133-35.) In *Van Scoy v. San Luis Coastal Unified School District*, (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086) the California District Court, discussing stay put in the context of changing grade levels, recognized that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. “The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.” (*Ibid.*) When a student’s “current educational placement” becomes unavailable, the local agency must provide the student with a similar placement in the interim. (*See Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533.)

## DISCUSSION

Student is 11 years old, resides with his parents within the District and is eligible for special education as a child with autistic like behavior with a secondary eligibility of intellectual disability. From August 31, 2011 through January 2012, District provided behavior support services to Student through California Institute of Behavior Analysis, Inc., LeafWing Center (CIBA or LeafWing). CIBA is a non-public agency (NPA). In February 2012, at Parent’s request, District began providing Student’s behavior support services through BAT, another NPA, which continued through the end of 2011-2012 school year. District did not contract with BAT for the 2012-2013 school year.<sup>1</sup> On August 13, 2012, District contracted with CIBA to provide services for Student and has agreed to provide a transition plan to CIBA. On August 30, 2012, Parents notified District that they did not consent to services provided by CIBA.

The IEP document dated October 11, 2011 and the addendum dated March 29, 2012, constitute Student’s last implemented IEP (collectively IEP). The IEP states District’s “Offer of FAPE: Services” in which the provider of the service is described as a “Nonpublic Agency.” Neither document specifies that the service shall be provided through a specific NPA. Although notes in the March 29, 2012, addendum mention CIBA, a “previous NPA,” a “new NPA” and BAT in various contexts and for various purposes, the document does not state that the NPA contained in the offer is BAT.

The single issue presented in this stay put motion is whether Student’s last implemented IEP requires Student’s behavioral support supervision be provided by a particular NPA and no other. Student contends District has unilaterally changed Student’s NPA provider from BAT to CIBA in violation of his right to stay put. District contends

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<sup>1</sup> The parties disagree about the circumstances under which the BAT contract was discontinued and other factual issues including the merits of the methods and strategies employed by BAT and CIBA, the conduct of District and BAT personnel and the timing, content and extent of communications between District and BAT. These factual issues are not relevant to this stay put motion because stay put is controlled by the IEP.

Student's IEP does not specify a particular provider, it is not practicable to provide services through BAT because District has terminated, for good cause, its contract with BAT, and District has provided, and continues to make available, behavior support services through an NPA. For the reasons set forth below, Student's motion must be denied.

The IEP provides behavior support services through an NPA. However, the IEP does not specifically require services be provided by BAT, therefore, BAT is not the stay put placement. Behavior support services through an NPA were provided through the 2010-2011 school year. District was free to contract with a different NPA for the next school year. Behavior support services through an NPA are in place and available for the 2012-2013 school year, should Parent's consent to accept these services.

The relative merits of the services provided by the two NPA's are not at issue in this motion. A school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified School District* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. School District No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special School District* (E.D. Mo. 2007) 47 IDELR 216.) That the District in this case has previously contracted with BAT, does not compel it to do so in the future.

Student relies upon *Joshua A. v. Rocklin Unified School District* (9th Cir. 2009) 559 F.3d 1036 (*Joshua A.*). *Joshua A.* is distinguishable. In *Joshua A.*, student appealed an administrative decision finding that the school district provided student a FAPE. The district court granted summary judgment in district's favor. Stay put was not an issue at the administrative or district court level. Student then filed an appeal with the Ninth Circuit. While the appeal was pending, the district notified the student's parents that it would be changing from one NPA to another, but would not alter the amount or quality of services to the student. The stay put motion sought reimbursement for educational costs incurred by parents during the appeals process as a result in this change. The Ninth Circuit affirmed the district court decision. The Ninth Circuit also held that the district was required to reimburse parents for the costs through the end of the appeal process, even where the District had prevailed both at the administrative level and in the district court. The matter was remanded to the district court to determine what the district owed Student for the cost of his education for the time period the appeal was pending. Thus, there is no holding in *Joshua A.* that would be applicable in this case. Moreover, the Ninth Circuit noted that there are circumstances that warrant a change in placement for purposes of stay put and cited *Van Scoy, supra*, 353 F.Supp.2d 1083, and *Johnson, supra*, 287 F.3d. 1176.

Here, Student has advanced a grade, District does not have a contract with BAT and the NPA in place and available provided the service in the past to implement the IEP. Accordingly, Student is not entitled to services from BAT for purposes of stay put.

ORDER

Student's Motion for Stay Put is denied.

Dated: September 28, 2012

/s/

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MARIAN H. TULLY  
Administrative Law Judge  
Office of Administrative Hearings